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Konsortium CMC Engineering Sdn Bhd — Colas Rail SA — Uni-Way Sdn Bhd v Ketua Pengarah Kastam, Jabatan Kastam Diraja Malaysia

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HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-25–368–11 OF 2021
AHMAD KAMAL J
4 OCTOBER 2023

C

Administrative Law — Judicial review — Application for — Application for judicial review against decision of Director General of the Royal Malaysian Customs Department ('respondent') in refusing to refund goods and services tax erroneously paid by applicant — Whether s 187 of Goods and Services Tax Act 2014 ('GST Act') applicable — Whether contract entered by applicant was 'contract with no opportunity to review' — Whether contract fell within purview of s 187 of GST Act and accordingly should be zero-rated — Whether respondent failed to consider correct provision and considered irrelevant provision — Whether respondent's decision contradicted power and objective of GST whereby cost should be borne by business — Whether respondent failed to provide justification for decision — Whether respondent's decision violated applicant's legitimate expectations that respondent would take cognisance of the law — Whether respondent's decision irrational, illegal and/or unreasonable — Rules of Court 2012 O 53

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F

Revenue Law — Goods and Services Tax (GST) — Refund — Application for refund of goods and services tax erroneously paid by applicant — Whether s 187 of Goods and Services Tax Act 2014 ('GST Act') applicable — Whether contract entered by applicant was 'contract with no opportunity to review' — Whether contract fell within purview of s 187 of GST Act and accordingly should be zero-rated — Goods and Services Tax Act 2014 ss 57(1)(a), 124(1) & 187 — Goods and Services Tax (Repeal) Act 2018 s 4(1)(b)

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The applicant was contracted to deliver the system works package for Kelana Jaya (KLJ) Line Extension Project ('the contract') by Prasarana Malaysia Bhd. In this regard, the Director General of the Royal Malaysian Customs Department ('the respondent') had informed the applicant that the existence of a variation order ('the VO') had opened up the opportunity to review the contract, resulting in goods and services tax ('GST') being charged at a rate of 6% from the date of GST implementation or the effective date of the VO or whichever earlier. The applicant then made an application in the prescribed Form 2 for a refund of the GST which was erroneously paid during the GST period from 1 April 2015–1 September 2018 ('the said period') amounting to

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RM26,729,336.11 but no decision was issued by the respondent. The respondent then informed the applicant that the applicant had failed to submit a review application under s 124(1) of the Goods and Services Tax Act 2014 ('the GST Act') and since s 124(1) of the GST Act had been repealed by the Goods and Services Tax (Repeal) Act 2018 ('the GST Repeal Act'), the applicant's application for review was denied without any further explanation. Aggrieved by the respondent's decision, the applicant filed the present judicial review application ('encl 14') under O 53 of the Rules of Court 2012 to seek an order for the respondent to exercise its powers under s 57(1)(a) of the GST Act, read together with s 4(1)(b) of the GST Repeal Act, to refund the GST erroneously paid by the applicant for the said period. The applicant's judicial review application was made premised on the grounds of illegality, irrationality/unreasonableness, and legitimate expectations. The applicant submitted that: (a) the contract fell within the purview of s 187 of the GST Act and accordingly should be zero-rated; (b) the respondent failed to take into account the correct provision and instead, considered irrelevant provision which led to an error of law in the process of their decision-making; (c) the respondent's decision was in contradiction with the power and objective of GST whereby the cost should not be borne by business; (d) the respondent failed to provide any justification for its decision; and (e) the respondent's decision was in violation of the applicant's legitimate expectation that the respondent would take cognisance of the law which in consequence had disproportionately deprived the applicant and led to an unjust enrichment on the part of the respondent.

Held, allowing encl 14 with no order as to costs:

(1) Judicial review was generally concerned with the decision-making process where the impugned decision was flawed on the ground of procedural impropriety. However, the law had developed to allow a decision to be challenged on grounds of illegality and irrationality, which then permitted the courts to scrutinise the decision not only for the process, but also for substance. The High Court would not interfere with a decision of the respondent unless it could be established that the decision was infected with errors of law. In order to succeed in an application for judicial review, the applicant must show that the respondent had, inter alia: (a) asked itself the wrong questions; (b) considered irrelevant matters; (c) failed to consider relevant matters; (d) failed to apply the proper principle(s) of law; and/or (e) reached a decision that was perverse that no reasonable tribunal under similar circumstances would have reached it (see paras 9–11 & 13).

(2) The following conditions had to be fulfilled before s 187 of the GST Act applied: (a) there was a written contract which specifically identified a supply and the consideration for that supply ('condition 1'); (b) such contract was a 'contract with no opportunity to review' ('condition 2');

(c) the supply was made pursuant to that contract ('condition 3'); and (d) such contract was entered into at least two years before the effective date of GST on 1 April 2015 ('condition 4'). The applicant had fulfilled conditions 1, 3 and 4 and the only issue in the present case was whether the contract was a 'contract with no opportunity to review' within the meaning of s 187 of the GST Act (see paras 16 & 21).

(3) The defendant had failed to appreciate that a mere VO in a construction contract could not automatically change the nature and consideration of a contract. It ought to be noted that s 187(3)(a) of the GST Act talked about a 'provision for a general review of the consideration' and not just any review. The respondent was wrong in determining that the VO had opened up the opportunity for a general review. There were no such clauses for a general review provided in the contract. The VO in the contract specifically mentioned the limited areas that were subject to be reviewed (ie, design or technical specifications) and that the consideration of the contract (ie, contact price) was a fixed lump sum that shall not be subject to adjustment or recalculation. Therefore, it was clear that the applicant satisfied all the conditions under s 187 of the GST Act which rendered the contract non-reviewable and shall be treated as a zero-rated supply. The applicant should not have been required to pay GST and was entitled to claim for the amount erroneously paid from 1 April 2015–1 September 2018 (see paras 24–25, 33 & 37).

(4) In coming to its decision, the court found that the respondent failed to take into account all relevant facts and documents. The respondent failed to appreciate that the applicant's application was made under s 57(1)(a) of the GST Act read together with s 4(1)(b) of the GST Repeal Act and not s 124(1) of the GST Act. This showed that the respondent failed in considering the relevant provisions of the application and instead had considered irrelevant matters (see paras 42–43).

(5) The court found that the respondent failed to give any justification or basis for its decision. The respondent's decision was contrary to Parliament's intentions. The respondent was under a duty to provide reasons and the failure to do so could lead to the conclusion that not only the decision but also the decision-making process was not made in accordance with the law (see paras 45–46).

(6) The present judicial review application was related to an application for a refund of monies which was owed by the respondent to the applicant, as such, there was no necessity for the applicant to make any appeals under s 124 of the GST Act. The correct procedure, as taken by the applicant in this case, was to apply for a refund of taxes that were paid erroneously under s 57 of the GST Act read together with s 4(1)(b) of the GST Repeal Act (see paras 48–49).

(7) The applicant had legitimate expectations that the respondent, acting as a public body, would apply its powers in accordance with the law. It was trite law that a decision by a public authority may be quashed on the ground that it was in violation of a legitimate expectation. Based on the facts, the applicant had registered as a registered person upon the advice of the respondent as the respondent suggested that it would avoid complications when the applicant claimed input tax. As such, it was only reasonable that the applicant had legitimate expectations that the cost of GST would not be imposed in relation to the contract. The respondent's failure to appreciate the implication of its decision was a clear breach of the applicant's legitimate expectations. Further, in disregard of relevant circumstances and regarding irrelevant circumstances had clearly violated the applicant's acquired and existing rights which amounted to illegality and error of law (see paras 51–52 & 54–55).

(8) It ought to be noted that the GST Act was not meant to burden businesses with additional costs to carry out businesses. However, the respondent's decision had resulted in the applicant spending an additional cost of RM26,729,336 on the project. This was clearly the opposite of what GST was meant to be. Further, the court was of the view that the respondent failed to rationally connect the objective of the GST Act to its decision. Had the respondent decided on the issue reasonably (ie, approving the applicant's application), it would not have impaired the applicant's rights disproportionately (see paras 58 & 60).

(9) Premised on the above reasons, the court was of the view that the respondent's decision was irrational and/or illegal and/or unreasonable which warranted the intervention of the court (see para 62).

[Bahasa Malaysia summary

Pemohon telah dikontrak untuk menghantar pakej *system works* bagi Projek Sambungan Laluan Kelana Jaya (KLJ) ('kontrak tersebut') oleh Prasarana Malaysia Bhd. Berkaitan dengan ini, Ketua Pengarah Jabatan Kastam Diraja Malaysia ('responden') telah memaklumkan kepada pemohon bahawa kewujudan perintah variasi ('PV') telah membuka peluang untuk mengkaji semula kontrak, menyebabkan cukai barang dan perkhidmatan ('GST') dikenakan pada kadar 6% dari tarikh pelaksanaan GST atau tarikh kuat kuasa PV atau yang mana lebih awal. Pemohon kemudiannya membuat permohonan dalam Borang 2 yang ditetapkan untuk pembayaran balik GST yang telah terkhilaf bayar dalam tempoh GST dari 1 April 2015–1 September 2018 ('tempoh tersebut') berjumlah RM26,729,336.11 tetapi tiada keputusan dibuat oleh responden. Responden kemudiannya memaklumkan kepada pemohon bahawa pemohon telah gagal mengemukakan permohonan semakan di bawah s 124(1) Akta Cukai Barang dan Perkhidmatan 2014 ('Akta GST') dan memandangkan s 124(1) Akta GST telah dimansuhkan oleh Akta Cukai Barang dan Perkhidmatan (Pemansuhan) 2018 ('Akta Pemansuhan GST'),

A permohonan pemohon untuk semakan telah ditolak tanpa apa-apa penjelasan lanjut. Terkilan dengan keputusan responden, pemohon memfailkan permohonan semakan kehakiman semasa ('lampiran 14') di bawah A 53 Kaedah-Kaedah Mahkamah 2012 untuk mendapatkan perintah supaya responden menjalankan kuasanya di bawah s 57(1)(a) Akta GST, dibaca B bersama s 4(1)(b) Akta Pemansuhan GST, untuk membayar balik GST yang telah terkhilaf bayar oleh pemohon untuk tempoh tersebut. Permohonan semakan kehakiman pemohon dibuat berdasarkan alasan-alasan kesalahan undang-undang, tidak rasional/tidak munasabah, dan harapan sah. Pemohon berhujah bahawa: (a) kontrak tersebut termasuk dalam bidang kuasa s 187 C Akta GST dan sewajarnya hendaklah berkadar sifar; (b) responden gagal mengambil kira peruntukan yang betul dan sebaliknya, mengambil kira peruntukan tidak relevan yang membawa kepada kekhilafan undang-undang dalam proses membuat keputusannya; (c) keputusan responden adalah bercanggah dengan kuasa dan objektif GST di mana kos tidak seharusnya D ditanggung oleh perniagaan; (d) responden gagal memberikan apa-apa justifikasi bagi keputusannya; dan (e) keputusan responden telah melanggar harapan sah pemohon bahawa responden akan mengambil tahu tentang undang-undang yang akibatnya telah memudaratkan pemohon secara tidak berkadar dan membawa kepada pengayaan yang tidak adil di pihak responden.

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Diputuskan, membenarkan lampiran 14 tanpa perintah berkaitan kos:

(1) Semakan kehakiman secara amnya adalah berkenaan dengan proses membuat keputusan di mana keputusan yang dipertikaikan telah cacat F disebabkan oleh ketidakwajaran prosedur. Walau bagaimanapun, undang-undang telah berkembang untuk membenarkan keputusan dicabar atas alasan kesalahan undang-undang dan tidak rasional, yang seterusnya membenarkan mahkamah meneliti keputusan tersebut bukan sahaja pada proses, tetapi juga pada zatnya. Mahkamah Tinggi tidak akan G mengganggu keputusan responden melainkan dapat dipastikan bahawa keputusan tersebut dicemari dengan kekhilafan undang-undang. Untuk menjayakan permohonan untuk semakan kehakiman, pemohon mesti menunjukkan bahawa responden telah, antara lain: (a) bertanya dirinya sendiri soalan yang salah; (b) mengambil kira perkara yang tidak H berkaitan; (c) gagal mempertimbangkan perkara yang berkaitan; (d) gagal menggunakan prinsip undang-undang yang sepatutnya; dan/atau (e) mencapai keputusan yang menyimpang yang mana tiada tribunal yang munasabah dalam keadaan yang sama akan mencapainya (lihat perenggan 9–11 & 13).

I (2) Syarat-syarat berikut perlu dipenuhi sebelum s 187 Akta GST terpakai: (a) terdapat kontrak bertulis yang secara khusus mengenal pasti suatu pembekalan dan balasan bagi pembekalan tersebut ('syarat 1'); (b) kontrak tersebut adalah 'kontrak tanpa peluang untuk dikaji semula' ('syarat 2'); (c) pembekalan telah dibuat menurut kontrak tersebut

('syarat 3'); dan (d) kontrak tersebut telah dimeterai sekurang-kurangnya dua tahun sebelum tarikh efektif GST pada 1 April 2015 ('syarat 4'). Pemohon telah memenuhi syarat 1, 3 dan 4 dan satu-satunya isu dalam kes ini ialah sama ada kontrak tersebut adalah 'kontrak tanpa peluang untuk dikaji semula' dalam pengertian s 187 Akta GST (lihat perenggan 16 & 21).

(3) Defendan telah gagal memahami bahawa PV semata-mata dalam kontrak pembinaan tidak boleh mengubah sifat dan balasan kontrak secara automatik. Perlu diingat bahawa s 187(3)(a) Akta GST bercakap tentang 'peruntukan untuk suatu kajian semula am bagi balasan' dan bukan sebarangan kajian semula. Responden telah salah dalam menentukan bahawa PV telah membuka peluang untuk kajian semula am. Tiada klausa sedemikian untuk kajian semula am yang disediakan dalam kontrak tersebut. Perintah variasi dalam kontrak tersebut secara khusus menyebut bahagian terhad yang tertakluk untuk dikaji semula (iaitu, reka bentuk atau spesifikasi teknikal) dan bahawa balasan kontrak (iaitu, harga kontrak) adalah jumlah sekaligus yang tetap yang tidak tertakluk kepada pelarasan atau pengiraan semula. Oleh itu, adalah jelas bahawa pemohon memenuhi semua syarat di bawah s 187 Akta GST yang menyebabkan kontrak tersebut tidak boleh dikaji semula dan hendaklah dikira sebagai suatu pembekalan berkadar sifar. Pemohon sepatutnya tidak perlu membayar GST dan berhak menuntut amaun yang terkhilaf bayar dari 1 April 2015–1 September 2018 (lihat perenggan 24–25, 33 & 37).

(4) Dalam membuat keputusannya, mahkamah mendapati responden gagal mengambil kira semua fakta dan dokumen yang berkaitan. Responden gagal memahami bahawa permohonan pemohon dibuat di bawah s 57(1)(a) Akta GST yang dibaca bersama s 4(1)(b) Akta Pemansuhan GST dan bukan di bawah s 124(1) Akta GST. Ini menunjukkan bahawa responden gagal dalam mempertimbangkan peruntukan yang berkaitan dengan permohonan dan sebaliknya telah mempertimbangkan perkara yang tidak relevan (lihat perenggan 42–43).

(5) Mahkamah mendapati bahawa responden gagal memberikan apa-apa justifikasi atau asas bagi keputusannya. Keputusan responden adalah bertentangan dengan hasrat Parlimen. Responden bertanggungjawab untuk memberikan sebab dan kegagalan berbuat demikian boleh membawa kepada kesimpulan bahawa bukan sahaja keputusan malahan juga proses membuat keputusan tersebut tidak dibuat mengikut undang-undang (lihat perenggan 45–46).

(6) Permohonan semakan kehakiman semasa adalah berkaitan dengan permohonan pembayaran balik wang yang terhutang oleh responden kepada pemohon, oleh itu, pemohon tidak perlu membuat apa-apa rayuan di bawah s 124 Akta GST. Prosedur yang betul, seperti yang

A diambil oleh pemohon dalam kes ini, adalah untuk memohon pembayaran balik cukai yang telah terkhilaf bayar di bawah s 57 Akta GST yang dibaca bersama s 4(1)(b) Akta Pemansuhan GST (lihat perenggan 48–49).

B (7) Pemohon mempunyai harapan sah bahawa responden, yang bertindak sebagai badan awam, akan menggunakan kuasanya mengikut undang-undang. Sudah menjadi undang-undang yang mantap bahawa keputusan oleh pihak berkuasa awam boleh dibatalkan atas alasan bahawa ia melanggar harapan sah. Berdasarkan fakta, pemohon telah C mendaftar sebagai orang berdaftar atas nasihat responden kerana responden mencadangkan bahawa ia akan mengelakkan komplikasi apabila pemohon menuntut cukai input. Oleh itu, adalah munasabah bahawa pemohon mempunyai harapan sah bahawa kos GST tidak akan dikenakan berhubung dengan kontrak tersebut. Kegagalan responden D untuk menghargai implikasi keputusannya adalah pelanggaran yang jelas terhadap harapan sah pemohon. Selanjutnya, kegagalan mengambil kira keadaan yang relevan dan mengambil kira keadaan yang tidak relevan telah jelas melanggar hak yang diperoleh dan hak sedia ada pemohon yang berjumlah kepada kesalahan undang-undang dan kekhilafan E undang-undang (lihat perenggan 51–52 & 54–55).

(8) Perlu diingatkan bahawa Akta GST tidak bertujuan untuk membebankan perniagaan dengan kos tambahan untuk menjalankan perniagaan. Bagaimanapun, keputusan responden telah menyebabkan F pemohon membelanjakan kos tambahan sebanyak RM26,729,336 untuk projek tersebut. Ini jelas bertentangan dengan tujuan GST. Selanjutnya, mahkamah berpendapat bahawa responden gagal menghubungkan secara rasional objektif Akta GST dengan keputusannya. Sekiranya responden memutuskan isu yang berkaitan G dengan munasabah (iaitu, meluluskan permohonan pemohon), ia tidak akan menjejaskan hak pemohon secara tidak berkadar (lihat perenggan 58 & 60).

(9) Berdasarkan alasan-alasan di atas, mahkamah berpendapat bahawa keputusan responden adalah tidak rasional dan/atau menyalahi H undang-undang dan/atau tidak munasabah yang memerlukan campur tangan mahkamah (lihat perenggan 62).]

Cases referred to

Director-General of Inland Revenue v Kulim Rubber Plantations Ltd [1981] I 1 MLJ 214; [1980] 1 MLRA 146, FC (refd)

Everise Sprint (M) Sdn Bhd v Minister of Finance, Malaysia & Anor [2015] 5 MLJ 379; [2015] 4 MLRA 332; [2015] 7 CLJ 309, CA (refd)

Ketua Pengarah Kastam dan Eksais v Coach Malaysia Sdn Bhd [2019] 2 MLJ 716; [2019] 2 MLRA 377; [2019] 4 CLJ 454, CA (distd)

Ketua Pengarah Kastam & Ors v George Kent — Lion Pacific JV & Anor [2022] MLJU 1542; [2022] MLRHU 1311; [2022] 1 LNS 1478, HC (refd)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1; [1999] 1 MLRA 336; [1999] 3 CLJ 65; [1999] 3 AMR 3529, FC (refd)
Mohamad Hassan bin Zakaria v Universiti Teknologi Malaysia [2017] 6 MLJ 586; [2017] 6 MLRA 470; [2017] 10 CLJ 36, CA (refd)
Mrf Ltd, Kottayam v Assistant Commissioner (Assessment) Sales Tax & Ors (2006) 8 SCC 702, SC (refd)
MTAA Superannuation Fund (RG Casey Building) Property Pty Ltd v Commissioner of Taxation [2012] FCAFC 89, FC (refd)
National Land Finance Co-operative Society Ltd v Director General of Inland Revenue [1994] 1 MLJ 99; [1993] 4 CLJ 339; [1993] 1 MLRA 512; [1993] 2 AMR 3581, SC (refd)
Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & Another Appeal [2005] 3 MLJ 97; [2004] 2 CLJ 265; [2004] 1 MLRA 137; [2004] 4 AMR 202, FC (refd)
Pembinaan Batu Jaya Sdn Bhd v Pengarah Tanah dan Galian, Selangor & Anor [2016] 2 MLJ 495; [2016] 5 MLRA 503; [2016] 5 CLJ 250, CA (refd)
Perbadanan Pengurusan Trellises & Ors v Datuk Bandar Kuala Lumpur & Ors [2021] 3 MLJ 1; [2021] 2 MLRA 513; [2021] 2 CLJ 808, CA (refd)
Power Root (M) Sdn Bhd & Ors v Director General of Customs [2014] 2 MLJ 271; [2013] 6 MLRH 301; [2013] 6 AMR 505, HC (refd)
Soonwee Trading Sdn Bhd v Ketua Pengarah Kastam & Anor [2022] MLJU 1725; [2022] 7 AMR 385, HC (refd)
Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317; [1995] 1 MLRA 268; [1995] 2 CLJ 748; [1995] 2 AMR 1601, CA (refd)

Legislation referred to

A New Tax System (Goods and Services Tax) Act 1999 [AU] s 13
Goods and Services Tax Act 2014 (repealed by Goods and Services Tax (Repeal) Act 2018) ss 57, 57(1)(a), 124, 124(1), 187, 187(1), (1)(b), (2), (2)(A), (2)(B), (2)(C), (3), (3)(a), Form 2
Goods and Services Tax (Repeal) Act 2018 s 4(1)(b)
Interpretation Acts of 1948 and 1967 s 30
Rules of Court 2012 O 53

S Saravana Kumar (with Amira Mohd Rafie Ravi) (Rosli Dahlan Saravana Partnership) for the applicant.
Farah Shuhada bt Ramli (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Ahmad Kamal J:

INTRODUCTION

[1] The applicant filed an application for judicial review (encl 14) under O 53 of the Rules of Court 2012 ('the ROC').

[2] The applicant seeks the following reliefs:

(a) an order for the respondent to exercise its powers under s 57(1)(a) of the Goods and Services Tax Act 2014 ('the GST Act'), read together with s 4(1)(b) of the Goods and Services Tax (Repeal) Act 2018 ('the GST Repeal Act'), to refund the GST erroneously paid by the applicant for the period from 1 April 2015–1 September 2018 amounting to RM26,729,336.11 on the ground that the GST was paid erroneously and pursuant to the applicant's application for refund of the GST dated 30 August 2021 ('the applicant's application for refund');

(b) a declaration that the system works package for Kelana Jaya (KLJ) Line Extension Project ('the contract') for the supply of goods and services entered into by the applicant and Prasarana Malaysia Bhd is non-reviewable in nature pursuant to s 187(1)(b) of the GST Act and therefore shall be treated as a zero-rated supply pursuant to s 187(2) of the GST Act;

(c) interest at the rate of 8%pa on the sum of RM26,729,336.11 from the date of the GST payment to the respondent until the date of full payment;

(d) that all necessary and consequential directions and orders be given;

(e) an order that the costs of this application be costs in the cause; and

(f) any other and further relief which this honourable court deems fit and proper.

[3] In gist, the applicant's judicial review is to seek among others, an order for the respondent to exercise their powers under s 57(1)(a) of the GST Act, read together with s 4(1)(b) of the GST Repeal Act, to refund the GST erroneously paid by the applicant for the period from 1 April 2015–1 September 2018 ('the applicant's application for refund') amounting to RM26,729,336.11.

[4] After the hearing, I allowed the applicant's judicial review (encl 14). The grounds for my decision appear below.

BACKGROUND FACTS

[5] The background facts gathered from the cause papers and submissions by the parties are largely undisputed and can be summarised as follows:

(a) the applicant is Konsortium CMC Engineering Sdn Bhd — Colas Rail SA — Uniway Sdn Bhd, a consortium established in Malaysia and with a registered address at A6-3A, Jalan Selaman 1/1, Dataran Palma, Ampang, 68000 Selangor;

(b) the applicant is a GST registered person whereby it is a consortium consisting of CMC Engineering Sdn Bhd, Colas Rail SA and Uniway Sdn Bhd. The applicant was formed in order to successfully deliver the system works package for the Kelana Jaya (KLJ) Line Extension Project;

(c) on 20 April 2012, the applicant was contracted to deliver the system works package for Kelana Jaya (KLJ) Line Extension Project ('the contract') by Prasarana Malaysia Bhd ('Prasarana');

(d) on 4 February 2015, following the implementation of the GST Act, the applicant wrote to Prasarana informing that the contract is a non-reviewable contract and as such, it is to be treated as a zero-rated supply. The applicant sought confirmation as to the implementation of GST to the contract;

(e) notwithstanding, based on advice from the respondent, the applicant registered as a GST-registered person and thereafter issued tax invoices accounting for 6% GST;

(f) on 7 October 2015, the respondent informed the applicant that the existence of a variation order ('VO') has opened up the opportunity to review the contract, resulting in GST being charged at a rate of 6% from the date of GST implementation or the effective date of the VO or whichever earlier. There were further correspondences between the parties. The applicant also wrote to the Minister of Finance to seek clarification on their predicament;

(g) the applicant thereafter, on 30 August 2021, made an application in the prescribed Form 2 for a refund of the GST which was erroneously paid during the GST period from 1 April 2015–1 September 2018 amounting to RM26,729,336.11;

(h) on 6 January 2022, the applicant was informed that the applicant's application was 'not processed' because the respondent had not issued a decision. On 25 January 2022, the respondent issued another letter informing the applicant that the applicant had failed to submit a review application under s 124(1) of the GST Act and since s 124(1) of the GST Act had been repealed by the GST Repeal Act, the applicant's application for review was denied without any further explanation; and

(i) on 25 February 2022, the applicant submitted a letter to the respondent expressing disagreement with the respondent's decision. The applicant emphasised that the applicant's application for refund was made pursuant to s 57(1)(a) of the GST Act, read together with s 4(1)(b) of the GST Repeal Act.

THE GROUNDS FOR JUDICIAL REVIEW

[6] Based on the statement, the applicant seeks to challenge the respondent's decision on the following grounds:

Illegality:

(a) the decision is ultra vires, illegal, void, unlawful and/or in excess of authority for the reasons outlined below:

Sections 187(1) and (2) of the GST Act

(i) ss 187(1) and (2) of the GST Act provide that where a contract is one with no opportunity to review, such contract shall be treated as a zero-rated supply and the supplier therefore would not be required under the law to charge or pay GST in relation to the contract;

(ii) the contract between the applicant (as the contractor) and Prasarana (as the employer) provides for extensive details of, among others, the conditions of the contract including that the value of the contract price will be the sum of RM673,920,651.04. It was further provided in cl 68.2 of the contract that the contract price is a fixed lump sum price and shall not be subject to adjustment or recalculation;

(iii) in this case the contract between the applicant and Prasarana is clearly one without an opportunity to review as defined in s 187(3) of the GST Act; and

(iv) the wording of s 4(1)(b) of the GST Repeal Act clearly states that any GST that was overpaid or erroneously paid may be refunded or remitted under the GST Act as if the GST Act had not been repealed;

(b) in addition to the above, the respondent had failed to consider the following questions:

(i) based on the above provisions, the applicant had rightfully made the application for refund of the GST amounting to RM26,729,336.11 and the respondent ought to have given due consideration of the application made by the applicant and in any event, should have provided its response to the applicant;

(ii) the respondent cannot deny the vested rights of the applicant as the provisions of the GST Repeal Act must be construed by having regard to s 30 of the Interpretation Acts of 1948 and 1967 which protects an acquired and existing right as recognised by the Supreme Court in *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99; [1993] 4 CLJ 339; [1993] 1 MLRA 512; [1993] 2 AMR 3581;

(iii) the respondent's decision to reject the application for refund goes against the object and spirit of the GST Act and is in violation of the applicant's legitimate expectation the respondent would adhere to the relevant statutory provision;

(iv) the decisions of our superior court and the English court show that the denial of legitimate expectations that have properly arisen would be unduly oppressive and an abuse of power; and

(v) the respondent has not provided any written explanation and justification to the applicant to this date which leads to the inevitable inference that the respondent has no good or justifiable reason to reject the applicant's application for a refund;

(c) the respondent also had failed to provide any written explanation and justification for its decision to this date;

(d) the respondent's decision is against the express wording and underlying purpose of s 57(1)(a) of the GST Act and as an arm of the Executive, the respondent must exercise their powers in accordance with the spirit of the law. It must be appreciated that every exercise of statutory power (in this case by rejecting the applicant's application for refund) cannot be arbitrarily exercised;

Irrationality/unreasonableness:

(e) the respondent's decision is further liable to be quashed on the ground that it is so unreasonable that no reasonable person could have come to that decision (Wednesbury unreasonableness). This is especially true when the respondent failed to give any valid justification, reason or basis for its decision;

(f) the respondent had acted unreasonably by not giving due consideration to the facts of the case and documentary evidence presented by the applicant. Any reasonable person with a clear understanding of the facts of this case and the law surrounding this matter would not have arrived at such a decision;

(g) further, there is also a good basis for the applicant to believe that the respondent had arrived at the respondent's decision arbitrarily and/or

mechanically without applying its mind to the facts and circumstances of the applicant, for the following reasons:

(i) all the relevant documents and information have been provided to the respondent pursuant to the applicant's application for refund dated 30 August 2021;

(ii) had the respondent considered the supporting documents, applied its mind to the circumstances of the applicant's case and considered the statutory provision in ss 57(1)(a) and 187(1) of the GST Act, the respondent would have allowed the application for a refund; and

(iii) the respondent failed to give any valid justification, reason or basis for taking the view that the applicant is not entitled to a refund and neither did the respondent rebut the documentary evidence presented to them;

(h) for the reasons set out above, it is clear that the respondent had acted irrationally and unreasonably in arriving at the respondent's decision;

Legitimate expectations:

(i) the respondent's decision was made without having any regard to the relevant legislation. This accordingly constituted a denial of the legitimate expectations of the applicant that the respondent will take cognisance of the law.

THE APPLICANT'S CONTENTION

[7] In gist, the applicant's contention in the present case, revolves around the interpretation of s 187 of the GST Act which is as follows:

(a) the contract falls within the purview of s 187 of the GST Act and accordingly should be zero-rated;

(b) the respondent failed to take into account the correct provision and instead, considered a provision that was irrelevant which subsequently led to an error of law in the process of their decision-making;

(c) the respondent's decision goes against the power and objective of GST whereby the cost should not be borne by businesses;

(d) the respondent failed to provide any justification for their decision; and

(e) the respondent's decision is in violation of the applicant's legitimate expectation which in consequence has disproportionately deprived the applicant and led to an unjust enrichment on the part of the respondent.

THE RESPONDENT'S SUBMISSION

[8] The respondent submitted as follows:

(a) initially, by perusing the original copy of the contract, the respondent agreed that the contract per se is a non-reviewable contract inclusive in s 187(1) of the GST Act;

(b) however, the status of non-reviewable contract does not automatically render the supply to be zero-rated. In order to treat the non-reviewable contract as zero-rated, there are still certain requirements to be fulfilled as explained in the case of *Ketua Pengarah Kastam & Ors v George Kent — Lion Pacific JV & Anor* [2022] MLJU 1542; [2022] MLRHU 1311; [2022] 1 LNS 1478 as follows:

(i) there is a written contract which specifically identifies a supply and the consideration for that supply;

(ii) such contract is a 'contract with no opportunity to review';

(iii) the supply is made pursuant to the contract; and

(iv) such contract was entered into at least two years before the effective date of GST which was on 1 April 2015;

(c) apart from that, there are additional statutory requirements to be fulfilled as laid down in the proviso in s 187(2) of the GST Act as follows:

(i) the supplier and recipient of the supply are registered persons (s 187(2)(A) of the GST Act);

(ii) the supply is taxable (s 187(2)(B) of the GST Act); and

(iii) the recipient is making wholly taxable supply (s 187(2)(C) of the GST Act);

(d) from the above stated provision, it is clear that zero-rated supply is not applicable to any registered persons if one of those conditions is not fulfilled;

(e) the respondent submits that, due to the:

(i) VO entered into by the applicant and Prasarana which changes the value of the contract; and

(ii) the failure of the applicant to prove that Prasarana is making wholly taxable supply,

resulting in the contract a reviewable contract and thus, standard-rated of 6% is imposed on the applicant under the GST Act;

(f) apart from that, it is the respondent's submission that:

A

(i) this judicial review was filed out of time; and

(ii) the impugned decision was not properly identified by the applicant.

B

THE LAW

[9] Judicial review is generally concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety.

C

[10] However, the law has now developed to allow a decision to be challenged on grounds of illegality and irrationality, which then permits the courts to scrutinise the decision not only for the process, but also for substance.

D

[11] It is settled law that the High Court will not interfere with a decision of the respondent unless it can be established that the decision is infected with errors of law.

E

[12] The meaning of error of law has also been explained by the Court of Appeal in the case of *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317; [1995] 1 MLRA 268; [1995] 2 CLJ 748; [1995] 2 AMR 1601 in the following words:

F

> *It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law*, for the categories of such an error are not closed. *But it may be said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations* (what may be conveniently termed an Anisminic error) or *if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law*. (Emphasis added.)

G

[13] Based on the foregoing passages, it is my view that to succeed in an application for judicial review, the applicant must show that the respondent had, among others:

H

(a) asked itself the wrong questions;

(b) considered irrelevant matters;

(c) failed to consider relevant matters;

I

(d) failed to apply the proper principle(s) of law; and/or

(e) reached a decision that was so perverse that no reasonable tribunal under similar circumstances would have reached it.

THE DECISION OF THE COURT

The contract is non-renewable according to s 187 of the GST Act

[14] Section 187 of the GST Act provides as follows:

187 Contract with no opportunity to review

(1) This section shall apply where —

(a) a written contract specifically identifies a supply and the consideration for the supply; and

(b) any supply is made pursuant to any contract with no opportunity to review entered into not less than two years before the effective date.

(2) Where a supply is made before the earlier of the following, that is —

(a) five years after the effective date; or

(b) when a review opportunity arises,

the supply made pursuant to a contract with no opportunity to review shall be treated as a zero-rated supply:

Provided that —

(A) the supplier and recipient of the supply are registered persons;

(B) the supply is a taxable supply; and

(C) the recipient is making wholly taxable supply.

(3) For the purposes of this section —

(a) 'contract with no opportunity to review' means any written contract or agreement which has no provision for a general review of the consideration for the supply for such a period until a review opportunity arises;

(b) 'review opportunity' means an opportunity that arises for the supplier under the contract, acting either alone or with the agreement of one or more of the other parties to the contract, to —

(i) change the consideration directly or indirectly because of the imposition of the tax;

(ii) conduct, on or after the effective date, a general review, renegotiation or alteration of the consideration; or

(iii) conduct, before the effective date, a general review, renegotiation or alteration of the consideration that takes account of the imposition of the tax.

[15] The above s 187 is a transitional provision that allows, subject to certain conditions, a taxable supply made pursuant to a contract with no opportunity

to review to be treated as a zero-rated supply for a period of five years from the effective date of GST (ie 1 April 2015) or until a review opportunity arises, whichever is earlier.

[16] The following conditions have to be fulfilled before s 187 of the GST Act applies:

(a) there is a written contract which specifically identifies a supply and the consideration for that supply ('condition 1');

(b) such a contract is a 'contract with no opportunity to review' ('condition 2');

(c) the supply is made pursuant to that contract ('condition 3'); and

(d) such contract was entered into at least two years before the effective date of GST on 1 April 2015 ('condition 4').

[17] The sole issue to be determined in this application is whether the supplies made by the applicant to Prasarana under the contract are eligible for exemption or zero-rated GST under s 187 of the GST Act.

[18] Having perused the contract, I am of the view that the contract falls within the purview of s 187 of the GST Act and accordingly should be zero-rated.

[19] Based on exh 'HAR3' of the applicant's affidavit in support (encl 4), it is clear that there is a written contract that identifies the supply and consideration for the supply.

[20] The contract was for the works to be executed in connection with the undertaking of the engineering, procurement, construction, testing and commissioning of system works for the Kelana Jaya Line (KLJ) Extension Project. The contract price (ie consideration) is a fixed lump price of RM673,920,651.04 that shall not be subject to any adjustment or recalculation as per cl 68.2 of the contract.

[21] The contract was entered not less than two years from the effective date of the GST Act on 1 April 2015. The contract was entered into on 20 April 2012 and deemed to have been effective on 21 June 2011.

[22] It looks like the applicant has fulfilled conditions 1, 3 and 4 as mentioned in para 16 above. However, the only issue in this case is whether the contract fulfills condition 2 ie whether the contract is a 'Contract with no opportunity to review' within the meaning of s 187 of the GST Act.

[23] The respondent took the view that the contract per se is a non-reviewable contract pursuant to s 187(1) of the GST Act. However, the respondent was of the view that: A

(a) the VO entered into by the applicant and Prasarana changed the value of the contract; and B

(b) the applicant failed to prove that Prasarana is making wholly taxable supply,

which resulted in the contract being reviewable and subject to the imposition of GST under the GST Act. C

[24] I find that the respondent had failed to appreciate that a mere VO in a construction contract cannot automatically change the nature and consideration of a contract. Upon perusal of the contract, I find that cll 12 and 68 of the contract expressly provide for the sufficiency of the contract price which is the consideration for supply. The scope of variations to the contract is strictly within the limited confines of the design of the project or supplementary works not included in the initial scope of the contract. It does not allow for the imposition of 6% GST. As such, the applicant should be allowed the full protection and benefits of s 187 of the GST Act. D E

[25] It is to be noted that s 187(3)(a) of the GST Act talks about a 'provision for a general review of the consideration' and not just any review. All of the words in the section have to be given their effect. An isolated reading which does not give the full effect to any particular word in the section would offend the basic rules of construction and interpretation of the statutory provision. F

[26] Whether the above mentioned variation to the design and supplementary work is deemed to be a 'general review of the consideration', all the words in cl 187(3)(a) of the GST Act ought to be given their effect and ought to be interpreted in accordance with the approach taken by the Federal Court in the case of *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & Another Appeal* [2005] 3 MLJ 97; [2004] 2 CLJ 265; [2004] 1 MLRA 137; [2004] 4 AMR 202 when it held as follows: G H

> [83] In my judgment s 17A has no impact upon the well established guidelines applied by courts from time immemorial when interpreting a taxing statute. Section 17A and these guidelines co-exist harmoniously for they operate in entirely different spheres when aiding a court in the exercise of its interpretive jurisdiction. *The correct approach to be adopted by a court when interpreting a taxing statute* is that set out in the advice of the Privy Council delivered by Lord Donovan in *Mangin v Inland Revenue Commissioner* [1971] AC 739: I
>
> > First, *the words are to be given their ordinary meaning. They are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidance*

devices. As Turner J said in his (albeit dissenting) judgment in *Marx v Inland Revenue Commissioner* [1970] NZLR 182 at 208, moral precepts are not applicable to the interpretation of revenue statutes.

Secondly, *... one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption so to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used* (Per Rowlatt J in *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64 at 71, approved by Viscount Simons LC in *Canadian Eagle Oil Co Ltd v Regeim* [1945] 2 All ER 499; [1946] AC 119.

Thirdly, *the object of the construction of a statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted.*

Fourthly, *the history of an enactment and the reasons which led to its being passed may be used as an aid to its construction.* (Emphasis added.)

[27] However, in the instant case, I find that the aforementioned variation to design and supplementary work cannot be deemed to be a 'general review of the consideration' which is absent in the present contract.

[28] It was held in Australia that a general review of the consideration would mean a 'complete or almost universal' review of the consideration or a review of 'nearly all of the consideration'.

[29] In the case of *MTAA Superannuation Fund (RG Casey Building) Property Pty Ltd v Commissioner of Taxation* [2012] FCAFC 89, the Federal Court of Australia summarised the Australian position in construing the words 'general review' in s 13 of the Australian A New Tax System (Goods and Services Tax) Act 1999 as follows:

... The Full Court in *DB Rreef* adopted the construction of the words 'general review' articulated at first instance by Sackville J: *'a complete or almost universal' consideration of the same subject*. At [82] the Full Court employed a synonymous phrase *'the whole or nearly all of the consideration for the supply'*. The Full Court in Westley Nominees again described 'general review' in the terms employed by Sackville J. His Honour in *DB Rreef* at first instance at [98] arrived at that construction by attributing the ordinary dictionary meaning for the words 'general review'. (Emphasis added.)

[30] The Federal Court in the case of *Director-General of Inland Revenue v Kulim Rubber Plantations Ltd* [1981] 1 MLJ 214; [1980] 1 MLRA 146 has established the trite principle whereby the decisions of the Commonwealth Courts should be given due and proper attention as a matter of judicial comity.

[31] Therefore, based on the above principle and given the similarity of s 13 of the Australian A New Tax System (Goods and Services Tax) Act 1999 and s 187 of the GST Act, I am of the view that the Australian approach ought to be taken in interpreting the words 'general review' in s 187 of the GST Act.

[32] Added to that, I find that cl 58 on variations is a very common clause in construction contracts that provides for a change in the scope of works and is not a means for parties to review the consideration for supply. Variation is defined in the contract in cl 58.1 as:

> *a change in the Final Design of the Works, or the Performance Specification which makes necessary the alteration or modification of the design, quality and quantity of the Works as described by or referred to in the Contract*, (otherwise than such as may be reasonably necessary for the purpose of rectification or defective design, materials, Plant or part thereof or workmanship due to the default of the Contractor) ... (Emphasis added.)

[33] Therefore, this court is of the view that the respondent is wrong in determining that the variation orders had opened up the opportunity for a general review. There are no such clauses for a general review provided in the contract. The variation orders in the contract specifically mentions the limited areas that are subject to be reviewed (ie design or technical specifications) and that the consideration of the contract (ie contract price) is a fixed lump sum that shall not be subject to adjustment or recalculation.

[34] This same issue had been discussed in my recent decision in the case of *Ketua Pengarah Kastam & Ors v George Kent — Lion Pacific JV & Anor* [2022] MLJU 1542; [2022] MLRHU 1311; [2022] 1 LNS 1478 which involved an appeal by the respondent against the decision of the Customs Appeal Tribunal. Having perused the tribunal's decision, I have affirmed the decision that the construction contract between the respondent (contractor) and Prasarana for the Ampang (AMG) Line Extention Project whereby:

(a) the original contract price or the value of the original supplies under the contract are eligible for zero-rating under s 187 of the GST Act; and

(b) supplies made under any variation are new supplies which are subject to GST.

[35] In *George Kent — Lion Pacific JV*, I have decided that:

> [43] The second respondent after considering the evidence presented has made the following findings of fact:
>
> 43.1 *The original contract price is a fixed price which is not subject to any adjustment or recalculation unless expressly provided in the contract* ...
>
> 43.2 The variation clause in cl 58 of the CoC (see pp 79–81 of P1 in exh OCK3

A of the first respondent's affidavit) *does not provide for any opportunity for a general review of the original contract price or allow any change to the consideration/main supplies that have been agreed* between Prasarana and the first respondent under the contract ...

B 43.3 The explanation of the appellant's witness, RW1, on variations is too general and does not solve the issue of whether the contract truly contains an opportunity for a general review of the consideration ...

43.4 The certificate of payment No 24 (see p 8 of R1 in exh OCK5 of the first respondent's affidavit) *does not show that the original contract price has been amended* since it is clear from the document itself that the additional amount C arose from a variation without any amendment to the original contract price ...

43.5 *There is nothing specific in the contract which provides for a 'general review' of the original contract price* ...

D [44] Therefore, it is not surprising that based on the above findings the second respondent had came to the decision to vary the appellant's decision that:

44.1 The original contract price or the value of the original supplies under the contract are *eligible for zero-rating under s 187 of the GST Act*; and

E 44.2 Supplies made under any variation are new supplies which are subject to GST.

...

[49] Therefore, based on the above, it is my view that since any review of the consideration (ie the contract price) by the first respondent is prohibited by the F CoC, *it cannot be said that there is a provision for a 'general review of the consideration'*. (Emphasis added.)

[36] This court in *George Kent — Lion Pacific JV* further held:

G [50] All in all, having read cl 58 of the CoC and explanation of the said cl by AW1, I agree with the submission of the first respondent that it is in accordance with the language of the CoC. In this regard:

50.1 'Variation' is defined in cl 58.1 of the CoC (see p 79 of P1 in exh OCK3 of the first respondent's affidavit) as follows:

H > ... a change in the Final Design of the Works, or the Performance Specification which makes necessary the alteration or modification of the design, quality and quantity of the Works as described by or referred to in the Contract, (otherwise than such as may be reasonably necessary for the purposes of rectification of defective design, materials, Plant or part I thereof or workmanship due to the default of the Contractor) ...

50.2 *It is clear from said definition of 'Variation' that a variation under the contract is merely a change in the scope of the works and not a review of the original contract price. Further, any change in the total consideration due to a variation would purely be incidental to the change of the scope of the works pursuant to the variation.*

> 50.3 Under the CoC, the value of a variation is to be ascertained by the employer's representative in accordance with the principles in cl 59.1 of the CoC (see pp 81–82 of P1 in exh OCK3 of the first respondent's affidavit). The employer's representative can also instruct the contractor to proceed on the basis of an estimate provided by the contractor pursuant to cll 58.6 or 58.7 of the CoC (see pp 80–81 of P1 in exh OCK3 of the first respondent affidavit).
>
> ...
>
> [52] It is therefore, *my considered view that cl 58 of the CoC does not provide for a 'general review of the consideration' and consequently, it does not disqualify the contract from being a 'contract with no opportunity to review*. (Emphasis added.)

[37] Therefore, it is clear that the applicant satisfies all the conditions under s 187 of the GST Act which renders the contract non-reviewable and shall be treated as a zero-rated supply. The applicant should not have been required to pay GST and is entitled to claim for the amount erroneously paid from 1 April 2015–1 September 2018.

[38] The respondent's contention that the contract price had varied from RM673,920,651.04 to RM899,049,939.17 cannot be accepted by this court since the respondent has not provided any explanation or tendered any evidence as to how they arrived at their calculations and conclusion that the variation is a change to the contract price.

[39] Further, this court finds that the respondent has not provided any explanation or tendered any evidence to support their contention that the applicant does not satisfy the requirements under s 187(2) of the GST Act on the basis that Prasarana, as a recipient, is not making wholly taxable supply as they were involved in the supply of residential and commercial buildings in the past.

[40] I would say the respondent's contention in this regard is a bare averment without any basis and evidence to support it.

[41] Further, I noticed that the issue of Prasarana's supply history was never raised by the respondent hence proving that it is an afterthought by the respondent to frustrate the applicant's judicial review.

[42] In coming to its decision, I find that the respondent has failed to take into account all relevant facts and documents. This is evident from the fact that when the applicant submitted the relevant Form 2 pursuant to s 57(1)(a) of the GST Act on 30 August 2021, the respondent had rejected the applicant's application on 5 January 2022 premised on the reason that s 124(1) of the GST Act has been rejected.

[43] The above decision by the respondent clearly shows that the respondent failed to appreciate that the applicant's application was made under s 57(1)(a) of the GST Act read together with s 4(1)(b) of the GST Repeal Act and not s 124(1) of the GST Act. This shows that the respondent had failed in considering the relevant provisions of the application and instead took irrelevant matters.

[44] In the case of *Everise Sprint (M) Sdn Bhd v Minister of Finance, Malaysia & Anor* [2015] 5 MLJ 379; [2015] 4 MLRA 332; [2015] 7 CLJ 309, the Court of Appeal held that the respondents ought to examine all relevant facts and documents in arriving at its decision. Decisions premised upon a wrong appreciation of the facts and a failure to consider relevant facts must be quashed. The decision of the customs in said case was tainted with illegality for failing to consider some relevant facts.

(See also: *Power Root (M) Sdn Bhd & Ors v Director General of Customs* [2014] 2 MLJ 271; [2013] 6 MLRH 301; [2013] 6 AMR 505.)

DUTY TO GIVE A REASON

[45] In the instant case, I find that the respondent failed to give any justification or basis for its decision. The respondent's decision is contrary to Parliament's intentions.

[46] Further, I am of the view that the respondent is under a duty to provide reasons. Failure to do so can lead to a conclusion that not only the decision but also the decision-making process was not made in accordance with the law.

[47] In the Court of Appeal case of *Pembinaan Batu Jaya Sdn Bhd v Pengarah Tanah dan Galian, Selangor & Anor* [2016] 2 MLJ 495; [2016] 5 MLRA 503; [2016] 5 CLJ 250, it was held:

> [45] As such, the principle as stipulated in the *Sri Lempah Enterprise*'s case is applicable in cases involving exercise of discretion, absolute or otherwise. High authorities have shown such phrase to be a gross anomaly that cannot pretend to even co-exist (see for instance: *Pyx Granite Co Ltd v Ministry of Housing and Local Government and Another* [1958] 1 All ER 625). *In exercise of a public power, there is no escaping the obligation on the part of the decision-maker to act reasonably in the peculiar circumstances of the case that appears before him. One of the fundamental features in modern administrative law jurisprudence has been the growing need for the public decision-maker to give reasons for his decision. It may be inconvenient to do so. But it is an indivisible component in all decision-making processes.* We find that every decision, both good and bad, is driven to such conclusion by a reason. The learned Justice Zainun Ali JCA (as she then was) in the case of *Datuk Justine Jinggut v Pendaftar Pertubuhan* [2012] 3 MLJ 212 had said this:

Thus, if no reason is given by the respondent, it is open for this court to conclude that he had no good reason in as much as it is open for us to conclude that the respondent had not exercised his discretion in accordance with the law.

The court further held as follows:

[49] Learned counsel for the respondent had also submitted that there was no duty expressly provided in the NLC for the SA to give or assign any reason(s) for deciding the way it deems fit. The case of *Minister of Labour, Malaysia v Sanjiv Oberoi & Anor* [1990] 1 MLJ 112; [1990] 1 CLJ Rep 200 was cited in support. But, we could not find any statute which contains express provisions that affirmatively prohibit a public officer, as a decision-maker, in the discharge of his public duty, from assigning any reason for his decision. Indeed, it would be most strange, if there was one such statute. We say so because it would defeat the essence of good governance and that it would not promote accountability and owing up to responsibility in decision-making. *As such, the silence in a statute requiring that a reason or reasons be given by the decision-maker ought not to be taken to mean that there was therefore no duty to give reasons. The silence in the statute, on the duty to give reason for a decision, ought not to be made a cloak or a blanket under which the decision-maker could conveniently find refuge so that the rationale for his decision remains shrouded in mystery, privy only to himself, but not to the public at large, on whose behalf, he is entrusted to discharge that duty.* That scenario would indeed be a contradiction in terms. The proper view, as stipulated by the apex court in the *Sugumar*'s case is to be preferred in that whether a reason need to be given by a decision-maker, is to be determined on a case by case basis. (Emphasis added.)

(See: *Perbadanan Pengurusan Trellises & Ors v Datuk Bandar Kuala Lumpur & Ors* [2021] 3 MLJ 1; [2021] 2 MLRA 513; [2021] 2 CLJ 808 and *Mohamad Hassan bin Zakaria v Universiti Teknologi Malaysia* [2017] 6 MLJ 586; [2017] 6 MLRA 470; [2017] 10 CLJ 36.)

ALTERNATIVE REMEDY

[48] The respondent further submitted that the applicant should have applied to review the respondent's decision under s 124 of the GST Act and that the applicant must first exhaust the internal remedy before appealing to the court.

[49] It is to be noted that the present judicial review relates to an application for a refund of monies which was owed by the respondent to the applicant. Therefore, I view that no necessity for the applicant to make any such appeals under s 124 of the GST Act. The correct procedure, as taken by the applicant in this case, is to apply for a refund of taxes that were paid erroneously under s 57 of the GST Act read to together with s 4(1)(b) of the GST Repeal Act.

[50] On this issue, I have decided in the case of *Soonwee Trading Sdn Bhd v Ketua Pengarah Kastam & Anor* [2022] MLJU 1725; [2022] 7 AMR 385,

A that it is not mandatory to exhaust the internal remedy under s 124 of the GST Act and it was held as follows:

> Internal remedy
>
> [31] *I find that the first respondent's PO that the appellant ought to resort to an internal remedy under s 124 of the GST Act before filing of the appeal to the second respondent has no merit in law.*
>
> [32] This is because having perused s 124 of the GST Act it clearly shows that the wording of the said section that *a taxpayer may apply for review to the Director General 'provided no appeal has been filed' showed that the application for internal review procedure is not a mandatory requirement before one files an appeal to the second respondent* and filing of an appeal to the tribunal are mutually exclusive, ie the taxpayer is to choose either one of the avenues and not both. (Emphasis added.)

LEGITIMATE EXPECTATIONS

[51] The court views that the applicant has legitimate expectations that the respondent, acting as a public body, would apply their powers in accordance with the law. It would be unfair to the applicant or any other bodies if the statutory powers were to be practiced inconsistent with the law and in an oppressive manner.

[52] It is trite law that a decision by a public authority may be quashed on the ground that it is in violation of a legitimate expectation (see *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1; [1999] 1 MLRA 336; [1999] 3 CLJ 65; [1999] 3 AMR 3529).

[53] Such doctrine is also applicable in tax cases, as demonstrated by the Indian Supreme Court in *Mrf Ltd, Kottayam v Assistant Commissioner (Assessment) Sales Tax & Ors* (2006) 8 SCC 702, where it was held that:

> *The doctrine of legitimate expectation has an important place in the developing law of judicial review.* It is, however, not necessary to explore the doctrine in this case, *it is enough merely to note that a legitimate expectation can provide a sufficient interest to enable one who cannot point to the existence of a substantive right to obtain the leave of the court to apply for judicial review*. (Emphasis added.)

[54] Based on the facts, the applicant had registered as a registered person upon the advice of the respondent as the latter suggested that it would avoid complications when the applicant claims for input tax. As such, it is only reasonable that the applicant had legitimate expectations that the cost of GST would not be imposed in relation to the contract/KLJ project.

[55] Therefore, this court is of the view that the respondents' failure to appreciate the implication of its decision is a clear breach of the applicant's

legitimate expectations. Further, in disregard of relevant circumstances and regarding irrelevant circumstances has clearly violated the applicant's acquired and existing rights which amounts to illegality and an error of law.

OUT OF TIME

[56] The respondent also contended that the applicant's judicial review was filed out of time by referring to the case of *Ketua Pengarah Kastam dan Eksais v Coach Malaysia Sdn Bhd* [2019] 2 MLJ 716; [2019] 2 MLRA 377; [2019] 4 CLJ 454.

[57] However, I find that the above case has no bearing on the present matter. The case deals with an application for judicial review which was filed out of time. It is clear in the present facts that the application for judicial review is premised on an application for refund which was made on 30 August 2021 and subsequently the application for judicial review was filed on 17 November 2021, well within the three month time frame.

PURPOSE AND OBJECTIVES OF THE GST ACT

[58] It is to be noted that the GST Act was not meant to burden businesses with additional costs to carry out businesses. The respondent's decision had resulted in the applicant spending an additional cost of RM26,729,336 on the project. This is clearly the opposite of what GST was meant to be — it should not be a cost to businesses.

[59] This has been reflected in the explanatory statement to the GST Bill 2014 which clearly shows that GST as a concept is not meant to burden businesses with additional costs but it is a broad-based consumption tax based on a valued-added concept when it said:

> ... The GST is a broad-based consumption tax based on a value-added concept ... Payment of tax is made in stages with by the intermediaries in the production and distribution process. *The tax itself is not a cost to the intermediaries and does not appear as an expense item in their financial statements.*
>
> GST covers all sectors of the industry and is *a tax on final consumption of goods and services*. It is collected through a credit system where GST incurred on inputs is offset against GST charged on outputs. (Emphasis added.)

[60] Further, this court is of the view that the respondent failed to rationally connect the objective of the GST Act to their decision. Had the respondent decided on the issue reasonably (ie approving the applicant's application), it would not have impaired the applicant's rights disproportionately.

A CONCLUSION

[61] Based on the above, it is clear that the applicant satisfies all the conditions under s 187 of the GST Act which renders the contract non-reviewable and shall be treated as a zero-rated supply. This court views that the applicant should not have been required to pay GST and is entitled to claim for the amount erroneously paid from 1 April 2015–1 September 2018.

[62] Premised on the aforesaid reasons, this court is of the view that the respondent's decision was irrational and/or illegal and/or unreasonable which warrants the intervention of this court.

[63] As such, the applicant's application for judicial review (encl 14) is allowed with no orders as to costs.

Enclosure 14 allowed with no order as to costs.

Reported by Dzulqarnain Ab Fatar